DISTRICT OF COLUMBIA
DOH Office of Adjudication and Hearings

DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH Petitioner, v. DRM & ASSOCIATES/TENDER LOVE CHILD DEVELOPMENT CENTER and DONALD MADDEN Respondents	Case Nos.: I-00-40309 I-00-40408

FINAL ORDER

I. Introduction

On December 20, 2000, the Government served a Notice of Infraction (No. 00-40309) upon Respondents DRM & Associates ("DRM"), Tender Love Child Development Center ("Tender Love") and Donald Madden alleging that they violated 29 DCMR 325.2, which forbids child development facilities to admit children who have not had a complete physical examination, and 29 DCMR 325.13, which requires a child development facility to have an annual medical report for every employee. The Notice of Infraction alleged that the violations occurred on December 6, 2000 and sought a fine of $500 for each violation.

Respondents did not file an answer to the Notice of Infraction within the required twenty days after service (fifteen days plus five additional days for service by mail pursuant to D.C. Official Code §§ 2-1802.02 (e), 2-1802.05). Accordingly, on January 18, 2001, this

administrative court issued an order finding Respondents in default, assessing the statutory penalty of $1,000 required by D.C. Official Code § 2-1801.04 (a)(2)(A) and requiring the Government to serve a second Notice of Infraction pursuant to D.C. Official Code § 2-1802.02(f).

The Government served the second Notice of Infraction (No. 00-40408) upon Respondents on January 23, 2001. Respondents filed a plea of Deny on February 2, 2001, and I issued an order setting a hearing date of March 9, 2001. All parties appeared on that date. Carmen Johnson, Esq. represented the Government, and Respondent Donald Madden, the owner of Tender Love and DRM, appeared on their behalf. The evidentiary hearing occurred on parts of three days – March 9, March 28 and April 11, 2001.

II. Amendments to the Notices of Infraction

At the beginning of the hearing, I called the parties' attention to a discrepancy between the citation to 29 DCMR 325.2 in the Notices of Infraction and the statement of the nature of the offense in those Notices. The Notices of Infraction describe the nature of the infraction as "Admission without proper immunization (children)." Section 325.2, however, requires that children cannot be admitted without a physical examination, but does not refer to immunizations. The following section – 29 DCMR 325.3 – requires that children must have appropriate immunizations before they are admitted into a child development facility. After some discussion of the issue, counsel for the Government moved to amend the Notice of Infraction to allege a

violation of § 325.3 in lieu of the allegation of a violation of § 325.2. I granted the motion after determining that Respondents would not be prejudiced by the amendment.[1]

During the hearing, the Government again moved to amend the Notices of Infraction. It sought to add a new charge – that Respondents violated 29 DCMR 326.5, which requires a child development facility to maintain a health record for each child, including information concerning immunizations. I granted that motion for reasons discussed on p. 11 below.

Based upon the testimony of the witnesses, my evaluation of their credibility and the documents introduced into evidence, I now make the following findings of fact and conclusions of law.

III. Findings of Fact

Tender Love operates a child development facility at 728 F Street, N.E. On November 6, 2000, April Bramble, an inspector employed by the Department of Health, visited the facility to conduct an inspection. At that time, she called the attention of Rosemary Richardson, the facility's director, to several circumstances that she believed violated the regulations governing child development facilities. Ms. Bramble noted that there was no report of an annual physical examination for Jacqueline Foster, one of the facility's employees. She also noted that there were no health certificates for several of the children and that some children needed additional immunizations or were due for required immunizations during November. Ms. Bramble spoke with Ms. Richardson several times on both the telephone and in person between November 6 and

[1] Respondents' representative stated that, based upon the factual allegations of the Notice of Infraction, he had come to the hearing prepared to defend against a charge that children had been admitted without proper immunizations.

December 6 to monitor her progress in correcting those conditions. On December 6, 2000, Ms. Bramble returned to the facility to determine if the conditions that she found on November 6 had been corrected.

A. The Employee's Health Certificate

On December 6, the facility still had no report of an annual physical examination for Ms. Foster. The facility's files contained a report of a negative tuberculin test, Respondents' Exhibit ("RX") 200, but no statement from a physician that Ms. Foster was free of communicable diseases. Evidence introduced by Respondents shows that Ms. Foster did not receive an annual physical examination until December 8, 2000. RX 201.

B. The Children's Immunizations and Records

On December 6, Ms. Bramble also found that Tender Love's records for three children showed, in her view, that those children did not have all immunizations required for admission to the facility. The children will be referred to by their initials to protect their privacy.

For the first child, M.M., whose date of birth is October 30, 1997, the only health certificate on file stated that he had not received any immunizations for hepatitis B and that he had received Hemophilus influenza type B (Hib) immunizations in April and October 1998 and in February 1999. RX 208. Evidence at the hearing established that the certificate on file was inaccurate. A certificate obtained by the facility some time after December 6, 2000 established that M.M. had received a fourth Hib immunization in September 1999 and had received hepatitis B immunizations in October and December 1997, and in October 1998. RX 202.

On December 6, 2000, the only health certificate on file at the facility for the second child, V.T., whose date of birth is July 9, 2000, showed that she received immunizations for DTP (diphtheria, tetanus, pertussis), polio and Hib only in September 2000. RX 214 at 3. Evidence at the hearing established that the certificate was inaccurate. A health certificate obtained by the facility some time after December 6, 2000 established that V.T. had received additional DTP, polio and Hib immunizations in November 2000. RX 213. Ms. Bramble testified, and I find, that the updated certificates for M.M. and V.T. demonstrate that they had all required immunizations on December 6, 2000, the date of her visit.

The third child whose immunizations are at issue is A.S., whose birth date is December 3, 1996. He was admitted to the facility on November 3, 2000. RX 210. On December 6, 2000, his health certificate on file at the facility showed that he had received three Hib immunizations, in December 1997, March 1998 and April 1999. RX 211. Unlike the other children whose immunizations are at issue in this case, A.S.'s health certificate was accurate on December 6. On December 11, 2000, A.S. received a fourth Hib immunization. Some time after that date, the facility obtained a health certificate attesting that he had received that immunization. RX 220.

C. The Role of DHS

Most, if not all, of the children cared for at Tender Love are referred there by the Department of Human Services ("DHS"), which provides most of the funding for their care. When it refers a child to Tender Love, DHS issues a voucher authorizing the facility to accept a child. Respondents contend that DHS is responsible for determining whether children have the proper immunizations before it makes such a referral. The evidence, however, is to the contrary.

DHS's standard contract with child care facilities states:

> The Provider [*i.e.*, the child development facility] shall require each parent/guardian to provide a current copy of each child's annual physical examination and health certificate, including any special health needs to the child [*sic*] and current immunizations, as required by Chapter 3 of Title 29, and to comply with all other health-related provisions of this Chapter. A copy of each child's health certificate shall be maintained in the Provider's files.
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> Petitioner's Exhibit ("PX") 110 at 4.

I admitted PX 110 at the March 28 hearing over Respondents' objection that it was an unsigned standard form, which was subject to negotiation by individual providers. I ruled that Respondents would be free to introduce their contract with DHS at the April 11 hearing to show that it contained different language than that quoted above. Because Respondents did not introduce their contract, the preponderance of the evidence persuades me that the contract contains the standard language in PX 110 requiring Respondents to obtain immunization information from the children's parents or guardians.

D. The Late Response to the First Notice of Infraction

The first Notice of Infraction was served on December 20, 2000. Mr. Madden testified that he did not receive it until some time in January, although his testimony about the exact day he received it was vague and unreliable. Mr. Madden filed a response with the Department of Consumer and Regulatory Affairs because he believed that agency had responsibility for adjudicating civil infraction cases involving child development facilities. The instructions on the Respondents' copy of the Notice of Infraction form, however, clearly instruct the Respondents to file a response with the Office of Adjudication and Hearings of the Department of Health.

IV. Conclusions of Law

A. The § 325.13 Violation

Section 325.13 of 29 DCMR provides:

> Each child development facility employee shall have an annual health examination by a licensed physician. A written report stating that the person is free from tuberculosis and other disease in a communicable form shall be submitted by the physician to the facility caregiver or director.

On December 6, 2000, the facility did not have the required physician's statement that Ms. Foster was free from communicable disease. While there was a report of a negative tuberculin test in the facility's records, there was no statement concerning other communicable diseases. Despite being warned about this deficiency during Ms. Bramble's November 6 visit, the facility had not corrected it by December 6. Indeed, Ms. Foster did not even visit a physician for her annual health examination until December 8, more than a month after Ms. Bramble's initial visit and two days after her return visit. The evidence establishes, therefore, that the facility violated § 325.13 on December 6.

B. The § 325.3 Charge

The Notices of Infraction, as amended, charge Respondents with one violation of 29 DCMR 325.3, which provides:

> No infant or child shall be admitted to a child development facility without having first obtained all immunizations appropriate to the age of the infant or child, as required by the D.C. Department of Human Services.

To establish a violation of § 325.3, the Government must prove that Respondents admitted a child to their facility who, at the time of admission, did not have all appropriate immunizations. The major issue in dispute on this charge is what immunizations are "appropriate" and at what time.

Section 325.3 states that DHS is responsible for determining which immunizations are appropriate. The Government contends that DHS's responsibility under the rule was transferred to the Department of Health, and that the Department of Health follows the recommendations of the Centers for Disease Control ("CDC"). It introduced various documents and charts that the Department of Health has distributed to child development centers showing the immunization schedule recommended by the CDC. PX 106-09. Respondents counter with a different set of documents issued by the Department of Health that, in their view, mandate a different schedule. RX 217-18. I will not rely upon the parties' exhibits in deciding what immunizations are legally required, however, because the Mayor and the Council have taken action that definitively prescribes the specific immunizations that are necessary for children in child development facilities.

In 1979, the Council enacted the Immunization of School Students Act, D.C. Law 3-20, D.C. Official Code § 38-501 *et seq*. That statute grants the Mayor the authority to prescribe regulations that specify the immunization standards that must be satisfied by anyone admitted to a "school," a defined term that includes child development facilities. D.C. Official Code §§ 38-501 (8)(C), 38-503. The Mayor last exercised that authority in 1997 by revising and updating the immunization regulations. 44 D.C. Reg. 1656 (March 21, 1997). The regulations are found at 22 DCMR 130 through 154.

Section 325.3, an agency-adopted regulation, can not divest the Mayor of the statutory authority to prescribe immunization standards nor can any standards adopted by an agency supersede the Mayor's regulations. *District of Columbia Preservation League v. Department of Consumer and Regulatory Affairs*, 646 A.2d 984, 990 (D.C. 1994) ("[A]ny administrative agency . . . must operate within the applicable statutory constraints in performing [its] assigned tasks.")[2] In evaluating the Government's claim that three children did not have appropriate immunizations, therefore, it is the 1997 regulations that must provide the standard for determining the immunizations that are required.

For two of the three children, M.M. and V.T., the Government's witness conceded that the updated health certificates provided by Respondents at the hearing showed that they had received all required immunizations. Because § 325.3 is violated only if children are admitted to a facility without actually having the required immunizations, admission of those two children to the facility did not violate §325.3.[3]

The Government contends that the third child – A.S. – should have received four Hib immunizations, but that he had received only three by December 6. Respondents argue that the fourth shot was not due until after A.S.'s fourth birthday (which occurred on December 3, 2000) and that he actually received the shot on December 11. The immunization regulations provide generally that three doses of Hib vaccine, plus a booster dose, should be administered during the

[2] The Government has not attempted to show that the Mayor's authority to adopt regulations under § 38-503 has been delegated to the Department of Health. Even if such a delegation has occurred, the Department has not exercised any such delegated authority. Section 38-503 requires immunization standards to be set forth in regulations, and the Department of Health has not altered the regulations issued by the Mayor in 1997.

[3] The Government's charge that Respondents' records concerning those children were inaccurate is discussed below.

first year of life. The first should be administered at two months of age, the second at two months after the first, and the third at two months after the second, with the booster dose at 12 months of age. 22 DCMR 134.1 to 134.5. A.S., however, did not receive his first Hib immunization until December 9, 1997, a few days after his first birthday. The immunization regulations prescribe separate schedules for children like A.S., who do not receive Hib immunizations on the schedule set forth in 22 DCMR 134.1 to 134.5. The required number and timing of immunizations vary, depending upon the child's age when the first Hib immunization is received. The regulation applicable to A.S. provides:

> Each previously unvaccinated or undervaccinated infant twelve (12) through fourteen (14) months of age shall be administered one (1) dose, followed by a booster dose. The booster dose shall be administered two (2) months after the previous dose, and no earlier than two (2) months after the previous dose.
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> 22 DCMR 134.7.

Because A.S. had not received an Hib immunization before December 9, 1997, he was "unvaccinated" within the meaning of § 134.7 on that date. Accordingly, the regulation required him to receive one immunization at that time and another one at least two months later. He received his second dose on March 23, 1998, thereby satisfying the regulation. A.S., therefore, had received all immunizations required by law when he was admitted to the facility, and his admission did not violate 325.3.[4]

[4] It might be argued that A.S. did not receive the proper Hib vaccinations because he received the second immunization in March 1998, which was beyond the two-month interval between shots prescribed by 22 DCMR 134.7. A.S., however, was 15 months old in March 1998. A separate regulation, 22 DCMR 134.8, provides that a 15–month old child should receive only one Hib shot. The shot he received in March, therefore, was all that the regulations required for a child of his age at that time.

The evidence establishes, therefore, that M.M., V.T. and A.S. all had received the legally required immunizations on December 6, 2000. Accordingly, Respondents are not liable for violating 29 DCMR 325.3.

C. The § 326.5 Charge

At the March 28 hearing, the Government sought to amend the Notices of Infraction to include a charge that Respondents violated 29 DCMR 326.5, which requires that "[a] health record shall be maintained for each infant or child enrolled in a child development facility" and that the record shall include information about "[s]pecific immunizations received, with dates." 29 DCMR 326.5. The Government's theory was that an amendment was proper to conform to the evidence, which showed that M.M. and V.T. had the required immunizations, but that the facility's records did not accurately reflect those children's current immunizations. I permitted Respondents, both orally at the March 28 hearing and in writing before resumption of the hearing on April 11, to oppose that motion by showing that they would be prejudiced in their ability to defend themselves if the amendment were allowed. *See Emerine v. Yancey*, 680 A.2d 1380, 1385 (D.C. 1996) (amendment of pleading to conform to the evidence is permissible if opposing party does not show actual prejudice). At the April 11 hearing, I granted the Government's motion for leave to amend because Respondents had failed to demonstrate any prejudice. The allegations that M.M.'s and V.T.'s records were inaccurate on December 6 are not factually complex. Either the records in Respondents' possession on that day contained complete and accurate information about all the immunizations that the children received or they did not. Respondents did not need to conduct a lengthy investigation to prepare to defend themselves. The two-week period between the Government's motion for leave to amend and the resumption of the hearing gave Respondents sufficient time to prepare a defense. Accordingly, the

Government's motion for leave to amend was granted and the Notices of Infraction are deemed amended to assert an additional charge of violating 29 DCMR 326.5.

Section 326.5 requires a facility to maintain a health record for each enrolled child, and identifies the information that each record must contain. Among the required items is information concerning "[s]pecific immunizations received, with dates." 29 DCMR 326.5(j). This means that the health records on file must have information about a child's immunizations, including the dates of those immunizations, that is accurate in all material respects. As this case illustrates, the Government's inspectors rely upon those records to determine whether the children in child development facilities are properly protected from a number of serious illnesses. A facility with inaccurate immunization records jeopardizes the Government's efforts to ensure this important health protection for children and, therefore, violates § 325.6.

On December 6, 2000, the only record in the facility's possession concerning M.M.'s immunizations was inaccurate. According to that record, M.M. had not received any hepatitis B immunizations. In fact, he had received three hepatitis B immunizations in 1997 and 1998. This inaccuracy was material, as hepatitis B immunizations are necessary before a child can be admitted to a child development facility. *See* 29 DCMR 325.3; 22 DCMR 135. Thus, the evidence concerning M.M. establishes that the facility's immunization records were materially inaccurate in violation of 29 DCMR 325.6.[5]

[5] V.T.'s records did not reflect the immunizations that she received on November 15, less than a month before the December 6 inspection. Because the Government charged only one violation of § 325.6, it is not necessary to decide whether her records also violated the regulation, and what interval, if any, is permitted between a child's immunization and the facility's updating of its records. Regardless of how I might decide those issues, the evidence concerning M.M. still would establish the one violation of § 326.5 charged by the Government.

Respondents' argument that they should be not be liable because DHS checked M.M.'s immunization records is wrong, for at least two reasons. First, the facility's contract with DHS obligates the facility, not DHS, to obtain current immunization information before enrolling the child. Second, the rules governing child development facilities provide that the facility's caregiver or director is responsible for complying with the health care and recordkeeping requirements. 29 DCMR 325.1, 326.1. There is no exception for facilities that care for children referred by DHS.

D. Fines and Liable Parties

Violation of 29 DCMR 325.13 is a Class 2 infraction, punishable by a $500 fine for the first offense. 16 DCMR 3222.1(r). Violation of 29 DCMR 326.5 is a Class 4 infraction, punishable by a $50 fine for the first offense. 16 DCMR 3222.3. The total fine amount due for the violations, therefore is $550.

The Notices of Infraction name DRM, Tender Love and Mr. Madden as Respondents. The evidence, however, established only that violations were committed by Tender Love. No evidence was introduced identifying DRM or explaining its relationship to Tender Love. Similarly, Mr. Madden is not the director of Tender Love and there was no evidence showing that he had any personal involvement in either the failure to have an updated medical record for Ms. Foster or in the failure to have accurate immunization records for M.M. Consequently, there is no basis for imposing liability for the violations upon either DRM or Mr. Madden. *DOH v. Newcomb Child Development Center,* OAH No. I-00-40912 at 5 (Final Order, January 8, 2002). Tender Love alone, therefore, must pay the fine of $550.

E. Statutory Penalties for Late Filing

The Civil Infractions Act, D.C. Code Official Code §§ 2-1802.02(f) and 2-1802.05, requires the recipient of a Notice of Infraction to demonstrate "good cause" for failing to answer it within twenty days of the date of service by mail. If a party can not make such a showing, the statute requires that a penalty equal to the amount of the proposed fine must be imposed. D.C. Official Code §§ 2-1801.04(a)(2)(A) and 2-1802.02(f). Respondents' only explanation for their failure to file a timely answer is that they believed they should have filed at DCRA. That explanation does not constitute good cause, because the instructions on the Notice of Infraction form make it clear that any response must be filed in the Office of Adjudication and Hearings in the Department of Health. Failing to carefully read important legal notices can not be a basis for reducing the statutory penalty. Respondents, therefore, are liable for that statutory penalty.

"The statutory penalty for failure to file does not depend upon whether the Government has established the underlying violations." *DOH v. Washington General Contractors*, OAH No. I-00-10387 at 11 (Final Order, July 11, 2001). The Council's purpose in enacting the penalty provisions of the Civil Infractions Act was to promote an efficient adjudication system by encouraging prompt responses to Notices of Infraction, regardless of whether any Respondent believes there is a valid defense to a charge. *Id.* Therefore, even though Mr. Madden and DRM were found not found liable for the infractions charged, they nevertheless are liable for the statutory penalty. Moreover, the penalty must include an amount equal to the total fines sought in the Notices of Infraction, including both the $500 fine for the §325.13 violation, which the Government proved, and the $500 fine for §325.2 violation, which it did not prove. D.C.

Official Code § 2-1801.04 (a)(2)(A) (penalty must be "equal to the amount of the civil fine for the infraction *set forth in the notice*") (emphasis added).[6] Thus, the total penalty required by statute for Respondents' late filing is $1,000, and all of the Respondents are jointly and severally liable for it. This means that Tender Love must pay a total of $1,550, consisting of a $550 fine and a $1,000 penalty. DRM and/or Mr. Madden must pay the $1,000 penalty if Tender Love fails to make its required payment.

V. Order

Based upon the foregoing findings of fact and conclusions of law, it is, this _____ day of _____, 2002:

ORDERED, that Respondents are **NOT LIABLE** for violating 29 DCMR 325.3, as alleged in the Notices of Infraction as amended; and it is further

ORDERED, that Respondents DRM & Associates are **NOT LIABLE** for violating 29 DCMR 325.13 and 326.5, as alleged in the Notices of Infraction as amended; and it is further

ORDERED, that Respondent Tender Love Child Development Center is **LIABLE** for violating 29 DCMR 325.13 and 326.5, as alleged in the Notices of Infraction as amended; and it is further

ORDERED, that Respondents have not demonstrated good cause for their failure to file timely answers to the first Notice of Infraction; and it is further

[6] Because the additional charge of violating 29 DCMR 326.5 was added by amendment at the hearing and was not "set forth in the notice" when Respondents failed to answer, there is no late filing penalty in connection with that charge.

ORDERED, that Respondent Tender Love Child Development Center shall pay a total of **ONE THOUSAND FIVE HUNDRED FIFTY DOLLARS ($1,550)** in accordance with the attached instructions within twenty (20) calendar days of the date of service of this Order (15 days plus 5 days service time pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05); and it is further

ORDERED, that Respondents DRM & Associates are jointly and severally liable with Respondent Tender Love Child Development Center for **ONE THOUSAND DOLLARS ($1,000)** of the amount specified above, which must be paid within the time specified above; and it is further

ORDERED, that if the Respondents fail to pay the above amounts in full within twenty (20) calendar days of the date of mailing of this Order, interest shall accrue on the unpaid amounts at the rate of 1 ½% per month or portion thereof, starting from the date of this Order, pursuant to D.C. Official Code § 2-1802.03 (i)(1); and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit full payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondents' licenses or permits pursuant to D.C. Official Code § 2-1802.03 (f), the placement of a lien on real and personal property owned by Respondents pursuant to D.C. Official Code § 2-1802.03 (i), and the sealing of Respondents' business premises or work sites pursuant to D.C. Official Code § 2-1801.03 (b)(7).

FILED 01/24/02

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John P. Dean
Administrative Judge